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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 196

SANFORD J. MOORE, SHERWOOD SCHWACH, and ALLEN KERNER, *Petitioners,*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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June 30, 1961

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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The petitioners Sanford J. Moore, Sherwood Schwach and Allen Kerner pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on May 18, 1961.

CITATION TO OPINION BELOW

The per curiam opinion of the Court of Appeals for the Second Circuit, dated May 18, 1961, is not yet reported. A copy thereof is annexed to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on May 18, 1961. On June 12, 1961, Mr. Justice Harlan signed an order extending the time for filing this petition for a writ of certiorari to and including July 1, 1961.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether Rule 32(d), Fed. Rules Crim. Proc., permits the withdrawal of a guilty plea prior to sentencing only where the plea was entered involuntarily, unknowingly or without full knowledge of the consequences, or whether the Rule also permits withdrawal where "any reason" appears demonstrating that the substitution of a not guilty plea "seems fair and just."

2. Whether a District Court abuses its discretion under Rule 32(d), Fed. Rules Crim. Proc., and frustrates appellate review of its action in denying a motion to withdraw a guilty plea, by relying in whole or in part upon factors which are deliberately kept secret from the defendant, his counsel and the appellate court.

RULE INVOLVED

Rule 32(d) of Federal Rules of Criminal Procedure:

> **Withdrawal of Plea of Guilty.** A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

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[1] On June 9, 1961, Mr. Justice Harlan denied an application for a stay of the Court of Appeals mandate pending certiorari proceedings.

STATEMENT OF THE CASE

On February 24, 1961, an indictment was filed against the petitioners asserting violations of 18 U.S.C. §§2, 152 and 371. That indictment charged petitioners with (1) concealing from the receiver and trustee in bankruptcy of the Gibraltor Amusements, Ltd., some 203 coin-operated music machines "and other property" worth approximately $100,000 belonging to the estate of the bankrupt, (2) fraudulently transferring and concealing 73 coin-operated machines in contemplation of bankruptcy, and (3) conspiring to conceal from the receiver and trustee the aforesaid 203 machines "and other property" of the bankrupt.

On March 9, 1961, petitioners' counsel stated to the District Court that the "defendants against the express advice of counsel wish to plead guilty to the indictment." The clerk of the court thereupon read the indictment to the three petitioners and asked them if they understood (1) that each of them had a right to a speedy and public jury trial, (2) that they were entitled on trial to compulsory process to obtain witnesses in their behalf and entitled to be confronted with witnesses against them, and (3) that the court had the power, in light of their guilty pleas, to sentence them to imprisonment terms. To each of those questions, the petitioners answered in the affirmative and then stated specifically that it was still their desire to plead guilty. They denied that any threats or promises had been made to induce the guilty pleas and answered "yes" to the clerk's inquiry as to whether the pleas were "being made voluntarily on your parts". The court thereupon set March 30 as the date for sentencing.

But during the interval between March 9 and March 29, the petitioners came to the realization of what the

guilty pleas actually meant to them and their families, especially in light of their knowledge and belief that they were actually not guilty of the alleged crimes. The enormity of their error and of the consequences of their guilty pleas finally penetrated their consciousness. Then, too, pending litigation concerning the validity of the bankruptcy proceedings underlying the indictment began to raise substantial questions in their minds about the advisability of the guilty pleas.[2] And so on March 29, 1961, at about 7:30 P.M., they authorized their attorney to withdraw their pleas of guilty and to substitute pleas of not guilty.

A transcript of the proceedings the following morning before Judge Rayfiel is part of the certified record before this Court. Before sentences were imposed, petitioners' counsel moved under Rule 32(d), Fed. Rules Crim. Proc., to withdraw the guilty pleas. After an extensive colloquy between counsel and the judge, the motion was denied and sentences were imposed. Petitioner Moore was sentenced to 3 years imprisonment, petitioner Schwach 2 years, and petitioner Kerner 15 months. Of particular pertinence are the following excerpts from this transcript:

> MR. BECKER [Counsel for petitioners]: Your Honor, I have an application to make.

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[2] Following oral argument on March 22, 1961, the Court of Appeals for the Second Circuit on May 24, by a divided 2-1 vote, affirmed the order of adjudication. *Gibraltor Amusements, Ltd.* v. *Wurlitzer Co.*, Docket No. 26812 (C.A. 2). It is contemplated that a petition for certiorari to review that judgment will be duly filed. the case raises a serious and unresolved question as to whether the bankruptcy proceeding was properly instituted by the requisite three creditors. One of the three was a wholly owned financing subsidiary of one of the other creditors and merely purchased certain of the bankrupt's notes held by the parent creditor.

I don't know whether you recollect the date of the pleading, but you will recall that at the time I made a statement to the effect that this plea of guilty being made by the defendants was against my direct advice and considered opinion. You then asked Mr. Williams and myself to approach the bench, and there I repeated the reason why I thought that there wasn't a crime, as alleged, and that there was no proof.

You then asked me why they were doing this, since they were apparently men of intelligence. At that time I said that I didn't know.

Your Honor, the defendants have decided that they would wish to withdraw their previous plea, of course, and that is subject to your Honor's discretion. They have felt that they would rather prove their innocence and not stain their families and their children by a plea to which they don't think they are guilty.

That was one of the reasons I made that statement the last time.

Now, your Honor, there has been no prejudice to anybody by this 21-day delay.

I might further add that I only argued the appeal in the Circuit Court of Appeals on March 22nd, that is with respect to an adjudication in this case.

Should that adjudication be reversed, there could be no indictment, the indictment would have to fall.

In addition, may I add there was a civil procedure pending against 25 defendants, including two banks, seven factors and other defendants involving the same property which is the subject of this indictment.

When all of these factors are taken into consideration, I think that we have a claim to your Honor's discretion to permit us to withdraw the plea of guilty and plead not guilty, and then have this case tried by a jury of these men's peers. [Tr. 2-3]

* * * *

THE COURT: . . . To me this application, I take it, is an application for leave to withdraw the plea of guilty and substitute a plea of not guilty, is—